property vests in the pledgee so far as is necessary to secure the debt ... he (pledgor) has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest.

See also s 125 of the Contracts Act 1950.

On the authorities and on the unchallenged evidence relating to the pledge, I hold that the contentions of the plaintiff fail. Article 14 does not operate to give the plaintiff a better right over that of the intervener by virtue of the charging order.

Next, it was contended for the plaintiff that the intervener being a wholly-owned subsidiary company of the Kion Hoong Organization, the pledge by the defendant of his shares in the Kion Hoong Organization to the intervener amounted to the company dealing in its own shares indirectly and is in contravention of s 67 of the Companies Act 1965. No authority was cited in support of the argument.

Section 67 in essence prohibits a company from giving a person financial assistance for the purchase of, or subscription for, its own shares, whether the financial assistance was given 'directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise'. It likewise prohibits such assistance by a subsidiary company to anybody desirous of acquiring, or subscribing for, the shares in its holding company. It also prohibits a company from, in any way, purchasing, dealing in or lending money on its own shares.

In the instant case, there is absolutely no evidence that either the Kion Hoong Organization or the intervener as a subsidiary company had provided financial assistance whether directly or otherwise or in any of the forms, eg loan guarantee or security, nor any evidence of the purpose of or in connection with the purchase or subscription by the defendant or any other person of or for any shares in the Kion Hoong Organization or in the intervener company. Neither is there any evidence suggesting or capable of suggesting that the Kion Hoong Organization or the intervener was in any way purchasing, dealing in or lending money on its own shares. The evidence goes to establish that the defendant trading under the firm of Kion Hoe Importers & Exporters was indebted to the intervener for goods sold and delivered to the defendant and as security for payment of the debt, the defendant pledged the shares to the intervener. There is no question of any of the two companies providing funds or financial assistance for the purpose of, or in connection with, the purchase or subscription of shares in the intervener company or in its holding company or of any of the two companies in any way purchasing, dealing in or lending money on its own shares. In my opinion, this ground of the plaintiff also fails.

In the result, the application of the intervener must, in my opinion, succeed. The parties have agreed that if the pledge ranks in priority, the charging order be made subject to the pledge. In the circumstance, I hold that the pledge created by the defendant in favour of the intervener is valid and that as between the plaintiff and the intervener in this action, the charging order nisi dated 6 October 1986 be made absolute but be ranked subject to the pledge created on 16 January 1986 in favour of the intervener. This means that the claim of the intervener in the shares of the defendant by virtue of the pledge shall rank in priority over that of the plaintiff by virtue of the order to show cause made herein on 6 October 1986 hereby to be made absolute. *Subject as aforesaid*, the interest of the defendant in the shares shall stand charged with the payment of $40,145.45 with interest thereon at 8% pa from 19 August 1986 and costs of $350 due from the defendant to the plaintiff on the judgment herein dated 19 August 1986 together with the costs of the plaintiff's application herein dated 25 September 1986.

Costs of and incidental to this application dated 8 April 1987 be paid by the plaintiff to the intervener. In the absence of an agreement, such costs are to be taxed.

Order accordingly.

Solicitors: *Loke, King & Co*; *Chan & Chan.*

Reported by *Ng Sheau Jiuan*

Lii Tat Credit & Mortgage Sdn Bhd v Tang Liing Kang

HIGH COURT (SIBU) – ORIGINATING SUMMONS NO 83 OF 1986
CHONG SIEW FAI J
31 MARCH 1988

Banking – Chargee's sale of land – Application for – Defences of non est factum, non-receipt of demand notice and moneylending transaction – Merits of case

Moneylenders – Chargee's sale of land – Application for – Defence that plaintiff is unlicensed moneylender – Where burden of proving that party is moneylender lies – Principles applicable – Moneylenders Ordinance (Cap 114), s 8(19)

Contract – Non est factum – Plea of – Burden of proof – Principles applicable

This is an application by the plaintiff under s 148(2)(c) of the Land Code (Cap 81) for sale of the defendant's land charged to the plaintiff to secure repayment of a loan advanced by the plaintiff to the defendant. In opposing the application, the defendant contended that: (a) the memorandum of charge was not explained to him (ie the defence of non est factum); (b) he did not receive the loan or any part thereof; (c) he did not receive or read the notices of demand given by the plaintiff; (d) the interest rate of 12% pa is excessive and unconscionable; and (e) the plaintiff's claim was illegal, void and unenforceable by

virtue of the provisions of the Moneylenders Ordinance (Cap 114), as the plaintiff is an unlicensed moneylender and the loan was a moneylending transaction.

Held, allowing the application: (1) To establish the plea of non est factum, there must be clear and positive evidence. The burden lies on the party seeking to disown the document which includes the burden of showing that in signing the document, he acted with reasonable care. He must show that the document signed was radically different from what he thought it was. The evidence of the defendant falls far short of establishing the plea of non est factum.

(2) The defendant has not proved on a balance of probabilities the allegation that he did not receive the loan or any part of it.

(3) The fact that a defendant did not receive the notice of demand or read the gazette notification constitutes no ground for refusing the application.

(4) The allegation that the interest rate of 12% pa is excessive and unconscionable has no merit at all.

(5) It is for the court to decide in each case whether a person or a company is a 'moneylender' within the ambit of the Moneylenders Ordinance. On the evidence adduced, the defendant has failed to discharge the onus of establishing on a balance of probabilities that the plaintiff is a 'moneylender' and that the Ordinance applies to the impugned transaction between the parties.

Case referred to

1 *Saunders* v *Anglia Building Society* [1970] 3 All ER 961 (HL) (folld)

Legislation referred to

Interpretation and General Clauses Ordinance
Moneylenders Ordinance (Cap 114) ss 2(2), 3(1), 7(1), 8(1)
Moneylenders Ordinance 1951 (West Malaysia) s 3

George Lau for the plaintiff.
Lee Bee Teck for the defendant.

Cur Adv Vult

Chong Siew Fai J: This is an application by the plaintiff under s 148(2)(c) of the Land Code (Cap 81) for sale of the defendant's land charged to the plaintiff to secure repayment of the sum of $45,000 advanced and interest. In opposing the application the defendant raised several issues.

Non est factum

Firstly, the defendant contended that sometime in February 1985, he signed what he 'now knows to be a memorandum of charge in the office of M/s Tang & Tang, Advocates at Sibu' and the charge was not explained to him. As against this, there is clear evidence from Mr Stephen Tang Chiew, who witnessed the defendant's signature, that he explained the contents of the charge to the defendant who indicated that he understood them before signing. Mr Stephen Tang's evidence is not challenged. At the hearing, counsel for the defendant contended that the defence of non est factum was available to the defendant. To establish the plea, there must be clear and positive evidence. The burden lies on the party seeking to disown the document; this includes the burden of showing that in signing the document, he acted with reasonable care. He must show that the document signed was radically different from what he thought it was (see *Saunders* v *Anglia Building Society*[1]). In the instant case, the burden is on the defendant. It is for him to prove all the circumstances necessary to justify the grant of relief upon such plea. The defendant had merely alleged that the charge was not explained to him. As against that, Mr Stephen Tang Chiew, an advocate, deposed having explained the charge to the defendant who indicated that he understood the contents and then signed. There was no challenge to Mr Tang's evidence. In the circumstance, I am inclined to accept his testimony on the point as the truth. The evidence of the defendant falls far short of capable to establish the plea of non est factum. I hold that the plea fails.

Money received?

Next, the defendant contended that he did not receive the loan or any part thereof. Against this, one Ting Pik King, the managing director of the plaintiff company, affirmed that he paid the sum $45,000 by a cheque (exh 'A' annexed to his affidavit made on 16 July 1987) which was received and cashed by the defendant. The cheque exh 'A' bore the name of the defendant and the 'bearer' thereon appeared to have been crossed out. It also appears that he had been paid cash on 6 February 1985. In his affidavit (para 3) the defendant said in early 1985 he was in need of money for his business. That being so, it appears strange that he made no complaint about not having received the money (at least there is no evidence before me of any such complaint). Upon the evidence, particularly the documentary evidence of payment of the amount advanced (exh 'A' and 'B') which goes in support of the plaintiff's case and respecting which the defendant did not answer, I find the defendant has not proved the allegation on a balance of probabilities and the contention fails.

Notice bad?

The defendant also contended that the notices of demand given by the plaintiff were irregular and bad, the basis for the contention being that the defendant had not received or read them. With respect, the reasons for the contention are devoid of merits. The first notice sent by registered post was returned marked 'moved away'. The defendant's address on the notice was that appearing on the memorandum of charge and there was no suggestion that that was not the last known address of the defendant. The second notice was published in a gazette notification under s 208(5) of the Land Code and there was no complaint about compliance with the relevant provi-

sions in the said s 208. In the circumstances, the fact that the defendant did not receive the notice or read the gazette notification constitutes no ground for refusing the application.

Interest excessive and unconscionable?

The allegation that the interest rate of 12% pa is excessive and unconscionable is unsupported by any fact and has no merit at all.

Plaintiff a 'moneylender'?

It was further contended for the defendant that the claim was illegal, void and unenforceable by virtue of the provisions of the Moneylenders Ordinance (Cap 114). The basis of the defendant's contention is in paras 6 and 7 of the defendant's affidavit made on 8 June 1987 and in paras 3 and 4 of Mr Lee Bee Teck's affidavit made on 22 March 1988 to which were annexed two pages of the memorandum of association of the plaintiff company. In paras 6 and 7 of the affidavit made on 8 June 1987, the defendant said:

> (6) I am advised and verily believe that the plaintiff is in fact an unlicensed moneylender, and even if the said loan had been advanced to me (which I deny), as the said loan is a moneylending transaction, the plaintiff's claim against me in this case is illegal by virtue of the provisions of the Moneylenders Ordinance and was accordingly void and unenforceable against me.
>
> (7) I am advised and verily believe that the president of the Sessions Court, Sibu issues moneylender licence to an individual and not to a limited company. The plaintiff is a limited company in this action. The plaintiff is required at the trial of this action to prove strictly that they have moneylender licence at all material times.

In paras 3 and 4 of his affidavit, Mr Lee said:

> (3) Object (40) of Lii Tat Credit & Mortgage Sdn Bhd on p 7 of the said attached exhibit 'A' states clearly: 'To lend and advance money or give credit to such persons or companies and on such terms as may seem expedient, and in particular to customers and others having dealings with the company, and to guarantee the performance of any contract or obligation and the payment of money of or by any such persons or companies and generally to give guarantees and indemnities.
>
> (4) As such, I aver and submit that the plaintiff Lii Tat Credit & Mortgage Sdn Bhd is a moneylender within the provisions of the Moneylenders Ordinance (Cap 114).

As regards the object clause, this is to determine the purposes of the creation of the company and to define its capacity. It identifies the scope within which the company's activities are to be confined. It is common practice that a company has numerous objects included in the object clause of its memorandum of association. For example, in the instant case, the plaintiff company has some 40 objects. But not all the stated objects may be carried out. Whether or not a company is engaged in activities within a specified object contained in its memorandum of association and, if so, the frequencies and extent of such activities are questions of fact to be established by evidence. In the context of the present case, the mere reference to the object of the plaintiff company is of no assistance.

As to para 7 of the defendant's affidavit made on 8 June 1987, the contention that the president of the Sessions Court does not issue moneylender licences to a limited company, even if true, does not mean that the transaction complained of in this action is bad. The question is whether the transaction is such that it is caught by the provisions of the Moneylenders Ordinance. Likewise, unless the transaction complained of is shown to fall within the ambit of the Moneylenders Ordinance, the plaintiff need not prove that it has a moneylender licence for the purpose of enforcing the claim. The question, therefore, is whether the plaintiff is a 'moneylender' such that its transaction forming the subject-matter of this action comes within the ambit of the Moneylenders Ordinance. It is necessary to consider the said Ordinance.

The first thing to note about the Ordinance is that it does not define the expression 'moneylender'.

Next, from the long title of the Ordinance it is clear that the purpose is to provide for the control of moneylenders. The provisions in the Ordinance relate mainly to the machinery and procedure of control.

Another feature is that the Ordinance does not have the presumption like in s 3 of the West Malaysian Moneylenders Ordinance 1951 providing that a person who lends a sum of money in consideration of a larger sum being repaid is deemed to be a moneylender for the purpose of the Ordinance until the contrary is proved. This, in my opinion, means that unless s 8(1) of our Ordinance applies, the burden of proving that a party is a 'moneylender' within the ambit of the Ordinance lies all the more on the party who asserts it. There is no statutory presumption to assist him. Furthermore, s 8(1) of the Ordinance, about which much had been said, does not exclude the excepted persons or institutions therein stated from the expression 'moneylender' but merely enacts to the effect that the Ordinance does not apply to the lending of money at interest by them. In other words, s 8(1) is not a definition clause but rather one excluding certain classes of persons and bodies from the application of the Ordinance. In answer to the defence contention, I would also mention that the word 'person' in the opening sentence of s 8(1) includes a limited company. Under the Interpretation and General Clauses Ordinance, 'person' includes any company whether incorporated or not. The words 'person other than' and the various exceptions in s 8(1) which include, inter alia, banking institutions and body corporate, in my opinion, strengthens this view.

With the above features in mind, particularly the long title of the Ordinance and s 8(1) not being a defini-

tion provision, and after considering the provisions in the Ordinance such as the requirement of keeping a register of moneylenders (s 2(2)), the registration of documents of debt in court (s 3(1)), the noting of payments in the register of deeds (s 7(1)), it is in my opinion for the court to decide in each case whether a person or company is a 'moneylender' within the ambit of the said Ordinance depending on all the particular facts and circumstances of each case. So far as the evidence goes in the instant case, there is only one isolated transaction ie the one between the parties herein now called into question. On the evidence as adduced, I am of the opinion that the defendant has failed to discharge the onus of establishing on a balance of probabilities that the plaintiff is a 'moneylender' within the ambit of the Moneylenders Ordinance and that the Ordinance applies to the impugned transaction between the parties. Accordingly, all the contentions of the defendant fail. The claims of the defendant are dismissed. The plaintiff is entitled to the relief as sought. There will be an order:

(1) For sale of the land in question as prayed for in prayer (a) of the originating summons by public auction under the directions of this court to satisfy the sum of $51,300 with interest at 12% pa from 1 May 1986 until sale or payment whichever is the earlier.
(2) That the money to arise from such sale be lodged in court to the credit of this action pending further order.
(3) Costs of the action be paid by the defendant to the plaintiff. In the absence of an agreement between the parties, such costs are to be taxed.
(4) There be liberty to apply.

Order accordingly.

Solicitors: *David Teng & Co*; *Teo & Co.*

Reported by *Ng Sheau Jiuan*

Philip Lau Chee Heng v Public Prosecutor

HIGH COURT (SIBU) – CRIMINAL APPEAL NO 9 OF 1987
CHONG SIEW FAI J
23 MARCH 1988

Criminal Procedure – Sentencing – Life imprisonment and whipping mandatory for offence punishable under s 4 of Firearms (Increased Penalties) Act 1971 – Whether mandatory – Principles applicable – Firearms (Increased Penalties) Act 1971, s 4

Criminal Procedure – Powers of revision of court – Discretionary power – General rule applicable as to enhancement of sentence

Words and Phrases – 'And' – 'Shall be punished with' – 'Imprisonment for life' – Firearms (Increased Penalties) Act 1971, s 4

The appellant pleaded guilty to the offence of exhibiting a firearm in a manner likely to put any person in fear of death at the time of committing a robbery. He was sentenced to three years' imprisonment and six strokes of whipping. The appellant appealed against the sentence, contending that the imposition of six strokes of whipping is manifestly excessive. Arising from the appeal, the Public Prosecutor also sought a revision of the case submitting that the sentence of three years' imprisonment was unauthorized by law and illegal in view of the mandatory sentence imposed by s 4 of the Firearms (Increased Penalties) Act 1971 ('the Act').

Held, dismissing the appeal and allowing a revision of the case:
(1) The penalty of imprisonment for life and whipping of not less than six strokes under s 4 of the Act, are, upon conviction, mandatory. The sentence of life imprisonment is a fixed one and is not the maximum that may be awarded so that a lesser sentence of imprisonment may be imposed. An imprisonment term of three years is clearly wrong and unsustainable.

(2) While the general rule is that the High Court in revision does not enhance a sentence even though illegality was committed by the lower court where the sentence passed involves substantial punishment, the court would have to act where the sentence is improper and is not in accordance with the law.

(3) Having regard to the mandatory sentence enacted in s 4 of the Act and having considered the facts which fell within that section, the three-year imprisonment sentence is clearly improper and unauthorized by or not according to law. The three-year sentence is altered to one of life imprisonment, and the mandatory six strokes of the whip are affirmed.

Cases referred to
1 *PP* v *Man bin Ismail* [1939] MLJ Rep 161 (refd)
2 *PP* v *Lee Ah Sam* [1949] MLJ 236(distd)
3 *Ng Chwee Puan* v *R* [1953] MLJ 86 (refd)
4 *Khor Seek Pok* v *PP* [1958] MLJ 170 (refd)
5 *PP* v *Wahab* [1964] MLJ 265 (refd)
6 *Darus* v *PP* [1964] MLJ 322 (refd)
7 *Jayanathan* v *PP* [1973] 2 MLJ 68 (refd)
8 *Nili Anak Gumbang & Ors* v *PP* [1985] 1 MLJ 464 (refd)
9 *PP* v *Mohamed Nor & Ors* [1985] 2 MLJ 200 (distd)
10 *Emperor* v *Lachiram* ILR 28 Bom 533 (refd)
11 *Liaw Kwai Wah & Anor* v *PP* [1987] 2 MLJ 69 (SC) (refd)

Legislation referred to
Criminal Procedure Code ss 173(m)(2), 294
Emergency Regulations 1948 reg 5(1)
Firearms (Increased Penalties) Act 1971 ss 2(1), 4
Interpretation Act 1967 ss 2(3), 60
Penal Code ss 298A, 396

Appeal from: Criminal Case No SC/5/87 (Sessions Court, Sibu)

Mat Ghani bin Abdullah (Legal Aid Bureau) for the appellant.
Siti Aisha bte Othman (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Chong Siew Fai J: In this case the appellant appeals against sentence. Initially, he was unrepresented. On his own plea of guilty to the offence of exhibiting a firearm, ie a shotgun in a manner likely to put any person in fear